ARGUMENT AMPLIFYING REASONS FOR WRIT

THE FOURTH CIRCUIT ERRED IN NOT ADDRESSING THE STATUTORY ERROR COMPONENT OF A *BLAKELY / BOOKER / FANFAN* CLAIM OF ERROR, AND THIS COURT SHOULD FIND THAT PETITIONER IS ENTITLED TO REMAND FOR IMPOSITION OF A SENTENCE UNDER AN ADVISORY APPLICATION OF THE GUIDELINES.

The opening brief and reply brief of appellant in the Fourth Circuit were filed July 12 and September 13, 2004, respectively, between the decisions in *Blakely* and *Booker*. In his opening brief, anticipating that *Blakely* would be extended to the federal sentencing guidelines, petitioner asserted a challenge to his sentence under the authority of *Blakely*. After the briefs in this case had been filed, *Booker* was decided in a way that recognizes two categories of sentencing error: (1) constitutional error, premised on the Sixth Amendment, which results when a defendant's sentence is increased beyond the maximum that would be allowed under the guidelines based solely on the facts found by the jury or admitted by the defendant in a guilty plea, and (2) statutory error based on mandatory, rather than advisory, application of the guidelines. *See Booker*, 543 U.S. at __, 125 S. Ct. at 768; *United States v. Rodriguez*, __ F.3d __ (4th Cir. 2006), 2006 WL 9602 (copy included in appendix, at pp. 11-21); *United States v. White*, 405 F.3d 208, 215 (4th Cir.), *cert. denied*, __ U.S. __, 126 S. Ct. 668 (2005).

The Fourth Circuit has recognized that a defendant's invocation of *Blakely* during the period between the decisions of *Blakely* and *Booker* is sufficient to notify the court of his position that his sentence is illegal and to identify the line of cases on which he is relying, thereby preserving not only any claim of Sixth Amendment error but also preserving a claim of statutory *Booker* error. *See Rodriguez*, __ F.3d at __, 2006 WL 9602, Appendix, at p. 20 (*Blakely* objection asserted at sentencing preserves claim of statutory *Booker* error); *see also* decisions of the First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals, cited in *Rodriguez*, Appendix, at p. 19-20. In addressing the *Blakely* issue raised by petitioner in the Fourth Circuit, the court addressed only the question of constitutional error, ignoring the other part of the *Booker* analysis – the claim of statutory error in the mandatory application of the guidelines. *See* Appendix, pp. 4-5. The Fourth Circuit erred in not addressing the statutory error aspect of the *Booker* analysis.

With respect to the merits of the statutory error claim, petitioner first contends that statutory *Booker/Fanfan* error – a sentence imposed under mandatory application of the guidelines – is structural error and therefore not subject to harmless error analysis. *See United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004); *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Petitioner recognizes that the Fourth Circuit and other courts of appeals have rejected this argument. *See, e.g., White*, 405 F.3d at 222. However, he raises it to preserve his claim and respectfully asks this Court to grant certiorari to resolve this question.

Even if the Court declines to hold that statutory *Booker/Fanfan* error is structural, petitioner contends, as the Sixth Circuit has held, that statutory error presents a situation in which the courts should presume prejudice. *See United States v. Barnett*, 398 F.3d 516, 526-29 (6th Cir.), *cert. dismissed*, __ U.S. __, 126 S. Ct. 33 (2005). As the Sixth Circuit noted in *Barnett*, the Fourth Circuit has implicitly adopted the presumption of prejudice in a situation in which the defendant was denied his right to allocute and thus "'may have been able to persuade the court' that a lower sentence was appropriate." *Barnett*, 398 F.3d at 527, *citing United States v. Cole*, 27 F.3d 996, 999 (4th Cir. 1994). In holding that statutory *Booker/Fanfan* error does not give rise to a presumption of prejudice, *see White*, 405 F.3d at 218-19, the Fourth Circuit has taken a position contrary to its earlier position in *Cole* in an analogous situation and contrary to the position of the Sixth Circuit in the situation now before the Court. This split in authority warrants a grant of certiorari so that this Court can resolve whether statutory *Booker/Fanfan* error gives rise to a presumption of prejudice.

In this case, if the presumption of prejudice is applied in accordance with the Sixth Circuit's analysis in *Barnett*, the record of petitioner's sentencing hearing reveals nothing that would rebut the presumption. *See* Appendix, at pp. 6-10. To the contrary, that record in fact demonstrates that there were considerations favoring leniency and a downward departure from the guidelines and, but for the mandatory nature of the guidelines, the district court likely would have sentenced below the bottom-of-the-guidelines sentence that it actually imposed.

Petitioner urges this Court to grant certiorari, find presumed prejudice that is not rebutted by the record, and remand for imposition of a sentence under the post-*Booker* advisory guidelines.

Finally, even if the Court does not recognize that statutory *Booker / Fanfan* error is structural error or results in a presumption of prejudice, the Court should nonetheless review the information placed on the record in petitioner's sentencing hearing and determine that it establishes prejudice such that remand for sentencing under the advisory guidelines regime is required. Under the mandates of *Booker*, the sentencing court is required to consider the range established by the guidelines but also to tailor the defendant's sentence in light of the statutory concerns outlined in 18 U.S.C. § 3553(a). *See Booker*, 543 U.S. at __, 125 S. Ct. at 756-57, 764-66. Following *Booker*, the sentencing court must (1) determine the appropriate sentencing range under the guidelines, making all factual findings appropriate for that determination, (2) consider that range along with the other factors described in 18 U.S.C. § 3553(a) and impose a sentence, and (3) if the sentence imposed is outside the range established by the guidelines, explain its reasons for the departure pursuant to 18 U.S.C. § 3553(c)(2). *See Booker*, 543 U.S. at __, 125 S. Ct. at 764-67; *United States v. Riggs*, 410 F.3d 136, 136-37 (4th Cir. 2005); *United States v. Hughes*, 401 F.3d 540, 546 (4th Cir. 2005).

In petitioner's case, if the district court had considered the factors of 18 U.S.C. § 3553(a)(1) and (2), it likely would have imposed a lower sentence than that advised by the guidelines. In the prior sentencing

proceeding, *see* Appendix, at pp. 6-10, information was produced concerning the nature and circumstances of this offense and the history and characteristics of the defendant that mitigate against the severity of the sentence advised by the guidelines. *See* 18 U.S.C. § 3553(a)(1). He was 53 years of age. This was his first criminal offense apart from a conviction for driving under the influence. He had a high school education and a history of gainful employment. He was on bond pending trial and again post-trial awaiting sentencing, and he continued to maintain his employment during that period. He had a demonstrated dedication to his family and roots in the community. These circumstances also were relevant to the need for the sentence imposed to meet the criteria of 18 U.S.C. § 3553(a)(2). In light of his age, his medical condition, his lack of any prior record other than a DUI, his satisfaction of the terms of his bond and his compliance with all its requirements, and his ability to hold down employment and be productive in society, it is likely the district court would have recognized that a lesser sentence than that advised by the guidelines was "sufficient, but not greater than necessary," to adequately punish this defendant, adequately deter criminal conduct, protect the public from prior crimes of this defendant, and provide the defendant with his needed medical care in the most effective manner, under the standard of 18 U.S.C. § 3553(a).

In this case, these facts, placed on the record during petitioner's sentencing, establish the prejudice that resulted to him from the mandatory application of the guidelines. The Fourth Circuit's failure to consider the statutory *Booker/Fanfan* error foreclosed his opportunity to urge the district court to sentence him

below the applicable guideline range on the basis of the factors of 18 U.S.C. § 3553(a)(1) and (2). Because those factors likely would have resulted in a departure from the post-*Booker* advisory guidelines, petitioner has demonstrated prejudice and is entitled to a remand for re-sentencing because of the statutory *Booker/Fanfan* error.

CONCLUSION

For the foregoing reasons, petitioner respectfully asks this Court to grant a writ of certiorari, review the decision of the United States Court of Appeals for the Fourth Circuit which affirmed the sentence imposed by the district court, reverse, and remand his case for sentencing in accordance with the dictates of *Booker* and 18 U.S.C. § 3553(a).

Respectfully submitted,

/s/ Jack B. Swerling
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January 30, 2006

APPENDIX

TABLE OF CONTENTS
Appendix to Petition

Page

Unpublished Opinion of
United States Court of Appeals
for the Fourth Circuit
entered November 1, 2005 ..... 1a

Excerpts of Transcript of
Sentencing Hearing before
The Honorable David C. Norton
on December 23, 2003 ..... 6a

Published Opinion of
United States Court of Appeals
for the Fourth Circuit
(*United States of America v.*
Efrain Rodriguez, a/k/a Feratu Rodriguez)
entered January 3, 2006 ..... 11a

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-4015

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

versus

LINDOYLE BRYANT, a/k/a Cubby,
Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. CR-02-647)

Submitted: August 22, 2005
Decided: November 1, 2005

[ENTERED: NOVEMBER 1, 2005]

Before WILKINSON, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Jack B. Swerling, LAW OFFICES OF JACK B. SWERLING, Columbia, South Carolina, for Appellant. J. Strom Thurmond, Jr., United States Attorney, Lee E. Berlinsky, Assistant United States Attorney, Charleston, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Lindoyle Bryant was convicted by a jury of conspiracy to possess with intent to distribute five kilograms or more of cocaine (Count 1) and attempting to possess with intent to distribute five kilograms or more of cocaine (Count 2). Bryant was sentenced to 151 months of imprisonment. He timely appeals alleging that: (1) the district court erred by admitting into evidence the recordings of certain telephone conversations; (2) the court erred by admitting evidence of Bryant's prior drug dealing; (3) the court erred by holding him responsible for drug amounts in excess of ten kilograms of cocaine; and (4) his sentence is invalid in light of the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296 (2004). Since Bryant's appeal, the Supreme Court has extended the reasoning of its Blakely opinion to the federal sentencing guidelines. See United States v. Booker, 543 U.S. __, 125 S. Ct. 738 (2005). For the reasons that follow, we affirm.

First, we find that the district court did not abuse its discretion by admitting into evidence the recorded telephone conversations between Carl Cooper and Cecil King. See United States v. Squillacote, 221 F.3d 542, 563 (4th Cir. 2000) (stating standard of review). The recordings were admitted into evidence as statements of a coconspirator in furtherance of a conspiracy under Fed. R. Evid. 801(d)(2)(E). The Government established that a conspiracy existed, that the

declarants Cooper and Bryant were members of the conspiracy, and that the statements were made in furtherance of the conspiracy. United States v. Pratt, 239 F.3d 640, 643 (4th Cir. 2001).

Second, we find that the district court did not abuse its discretion by allowing Cooper's testimony regarding his and Bryant's prior purchases of approximately nineteen kilograms of cocaine from Floyd Hicks from late 1998 to early 2002 under Fed. R. Evid. 404(b). See United States v. Mark, 943 F.2d 444, 447 (4th Cir. 1991) (stating review standard); United States v. Tanner, 61 F.3d 231, 237 (4th Cir. 1995) (noting that a trial court's decision to admit prior acts evidence will not be overturned unless arbitrary or irrational). We find that the evidence was relevant to an issue other than character, was necessary to prove an element of the crimes charged, and was reliable; moreover, its probative value was not substantially outweighed by its prejudicial nature. United States v. Queen, 132 F.3d 991, 997 (4th Cir. 1997).

Next, Bryant alleges that the district court erred by finding him responsible at sentencing for more than the ten kilograms of cocaine sustained by the jury's verdict. We find that the district court did not clearly err in relying on the testimony of Cooper regarding the prior drug purchases from Hicks to find that Bryant was responsible for an additional nineteen kilograms of cocaine. See United States v. Lamarr, 75 F.3d 964, 972 (4th Cir. 1996) (noting that a sentencing court's approximation of the amount of drugs for sentencing is not clearly erroneous if it is supported by competent record evidence).

Finally, Bryant alleges, for the first time on appeal, that his sentence violates the Sixth Amendment because he was held responsible at sentencing for cocaine amounts beyond those supported by the jury's verdict, i.e., quantities in excess of ten kilograms. Because Bryant failed to raise this issue in the district court, we review this claim for plain error. United States v. Harp, 406 F.3d 242, 247 (4th Cir. 2005). To establish plain error, Bryant must show that an error occurred, that the error was plain, and that the error affected his substantial rights. United States v. Olano, 507 U.S. 725, 732 (1993); United States v. White, 405 F.3d 208, 215 (4th Cir. 2005). To establish that a Sixth Amendment error occurred in his sentencing, Bryant must show that the district court imposed a sentence exceeding the maximum allowed based only on the facts that he admitted or that were established by the jury's verdict. See Booker, 125 S. Ct. at 756 (holding that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"); United States v. Hughes, 401 F.3d 540, 546-47 (4th Cir. 2005).

Bryant seeks resentencing based only on the ten kilograms of cocaine, which would give him a base offense level of 32 under U.S. Sentencing Guidelines Manual § 2D1.1(c) (2003) and, with his criminal history category of I, would give him a sentencing range of 121 to 151 months of imprisonment. Because, however, his instant 151-month sentence falls within this range, his claim

fails See United States v. Evans, 416 F.3d 298 (4th Cir. 2005) (holding there is no Sixth Amendment error when a sentence is imposed within the range allowed by facts admitted by the defendant or supported by a jury's verdict).

Accordingly, we affirm Bryant's sentence and convictions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

MR. SWERLING: Nothing further.

THE COURT: All right. I'm going to — I'm going to adopt these guideline ranges.

And I'll be glad to hear from Mr. Berlinsky, if you have anything to say about the sentencing.

MR. BERLINSKY: No, sir, Your Honor.

THE COURT: Okay.

All right. Mr. Swerling, I'll be glad to hear from you and Mr. Bryant, and any recommendation where he would like to serve his sentence.

MR. SWERLING: Judge, could you indulge me one moment?

THE COURT: Sure.

MR. SWERLING: Judge, I just want to make sure, I was not being critical of the probation officer, as far as his calculations. He took them from the trial transcript and the DEA 6. He actually did an excellent job in the preparation of the report, and it is going to save my breath, and also save the Court from having to hear a whole lot from me, because he was very thorough in putting in Mr. Bryant's background.

Judge, as you can see, Mr. Bryant is 52 years old, or 53 years old. He has some medical problems, which are outlined and detailed in there. He comes from a very large family. He's a Native American. He has, other than the DUI, no criminal record. He has a history of gainful employment.

29

He pursued his education through high school and finished high school. He has several children, as outlined in the pre-sentence report. Most of them have reached majority, but it is evident that he is taking care of those children from three different relationships. And throughout his life, there is no indication in here that he was ever without gainful employment, or even now is still with gainful employment.

So it appears, Your Honor, that this would be his first major brush with the law, with the exception of the DUI, as I said, which I take the position is not a major violation.

Judge, I would ask the Court to consider the minimum sentence under the guidelines, I think it's 151 months, which would take into consideration, I believe, Mr. Bryant's background, his education, his background, his dedication to his family, his roots in his community, and the lack of criminal history.

And with that, I really do not think that I need to go any further with that. I think the pre-sentence report bears out what I've said, and I would ask the Court to consider that.

THE COURT: Okay.

All right. Mr. Bryant, you have a right to say anything you would like with regard to your sentence. If you would like to say anything, I'll be glad for hear from you. If you don't want to say anything, you don't have to.

30

THE DEFENDANT: I would like to ask the Judge to be as lenient as possible.

THE COURT: All right. Now, Mr. Swerling, with his medical problems, do you want me to designate Butner or Seymour Johnson, or what? Both of those are relatively close to where he lives.

MR. SWERLING: Yes, Your Honor. He lives in Maxton, one of those facilities which is as close to Maxton, North Carolina as possible. Butner would qualify, because of his medical condition, but other than that, Seymour Johnson, if Your Honor would designate those institutions, or North Carolina.

THE COURT: Okay.

MR. SWERLING: And I think that would be sufficient.

THE COURT: All right. Then we'll just put on either Butner or Seymour Johnson, or the closest institution to Maxton, North Carolina as Mr. Bryant qualifies for. Okay.

MR. SWERLING: Judge, the other thing I would like to point out is throughout the period of time Mr. Bryant has been out of jail, he was initially released when posting bond, went to trial, he was taken into custody. He was again released the day after. So he has complied, as far as I understand fully, with the terms and conditions of his release and supervision.

So number one, I would like to add that to the Court,

31

in my plea for the Court, to sentence him on the minimum end of the guidelines, because he has been completely compliant with those conditions.

And in addition, I would ask the Court to consider allowing him to self report. Since Your Honor let him out after his trial, nothing has changed, and he has been compliant with his supervision and with his monitoring.

THE COURT: Okay. Any problem with that?

MR. BERLINSKY: No objections, Your Honor.

THE COURT: All right. Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, Lindoyle Bryant, is hereby committed to the custody Bureau of Prisons

to be imprisoned for a term of 151 months as to Count 1, and 151 months as to Count 2 concurrent. $200 special assessment, which is due immediately.

Upon release, supervised release for a term of five years. While on supervised release, shall comply with the mandatory standard conditions of supervision outlined in Title 18, United States Code, 3583(d).

Following special conditions: Shall participate in a program of testing and treatment for substance abuse as directed until he's released by the Probation Officer.

Anybody have any objection to the form of the sentence I imposed?

MR. BERLINSKY: No, sir.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 04-4609

EFRAIN RODRIGUEZ, a/k/a Feratu Rodriguez,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CR-04-114)

Argued: December 2, 2005
Decided: January 3, 2006

Before TRAXLER, KING, and DUNCAN, Circuit Judges.

Vacated and remanded by published opinion. Judge King wrote the opinion, in which Judge Traxler and Judge Duncan joined.

COUNSEL

ARGUED: Geremy Charles Kamens, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. Beth Nicole Gibson, Special Assistant United States Attorney, OFFICE OF THE

UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Frank W. Dunham, Jr., Federal Public Defender, Frances H. Pratt, Research and Writing Attorney, Alexandria, Virginia, for Appellant. Paul J. McNulty, United States Attorney, Eugene J. Rossi, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

OPINION

KING, Circuit Judge:

Appellant Efrain Rodriguez seeks relief from the forty-six-month sentence imposed upon him after his 2004 guilty plea and conviction in the Eastern District of Virginia. Rodriguez was convicted of unlawfully entering the United States after having been deported, following an earlier conviction for an aggravated felony, in violation of 8 U.S.C. § 1326(a) and (b)(2). In calculating his sentencing range, the district court found that Rodriguez had a prior conviction for a crime of violence and, pursuant to § 2L1.2(b)(1)(A)(ii) of the Sentencing Guidelines, applied a 16-level sentencing enhancement. Treating the Guidelines as mandatory, the court sentenced Rodriguez at the bottom of his 46-to-57-month sentencing range. Rodriguez objected to the procedures utilized by the court, contending that they contravened the Sixth Amendment principles enunciated in *Blakely v. Washington*, 542 U.S. 296 (2004).

On appeal, Rodriguez challenges his sentence by relying on *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), in which the Supreme Court

applied *Blakely*'s principles to the Guidelines and decided that statutory error occurs when a sentencing court treats the Guidelines as mandatory. As explained below, Rodriguez's *Booker* claim entitles him to relief, and we vacate and remand.

I.

On July 27, 2002, Rodriguez was convicted in the Circuit Court of Prince William County, Virginia, on two counts of aggravated sexual battery, in contravention of section 18.2-67.3 of the Virginia Code. He was sentenced in state court to ten years in custody on each offense, to be served concurrently, with eight years and eleven months suspended. On January 13, 2004, following his release from 2 UNITED STATES v. RODRIGUEZ state custody, Rodriguez was removed to Mexico. Fifteen days later, on January 28, 2004, Rodriguez was found in Prince William County and arrested.

On March 28, 2004, the federal grand jury returned a single count indictment charging Rodriguez with violating 8 U.S.C. § 1326(a) and

(b)(2),[1] by entering and being found in the United States following deportation, "after having been convicted of an aggravated felony." J.A. 6-7.[2] Rodriguez pleaded guilty to this offense on April 20, 2004. In connection with his plea, he executed a Statement of Facts, by which he admitted entering the United States "after being removed . . . subsequent to a conviction for the commission of an aggravated felony." J.A. 18.

Rodriguez's presentence report (the "PSR"), filed on June 3, 2004, recommended a base offense level of 8, as provided for in § 2L1.2(a). It further recommended a finding that Rodriguez had been convicted of a crime of violence prior to his removal,

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[1] Section 1326(a) of Title 8 provides for a sentence of up to two years for an alien who, after being removed, enters the United States without permission. Section 1326(b)(2) authorizes an enhanced sentence of up to twenty years for an alien who contravenes § 1326(a) and "whose removal was subsequent to a conviction for commission of an aggravated felony."

[2] Our citations to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties in this appeal.

and advised the court to apply the 16-level enhancement provided for in § 2L1.2(b)(1)(A)(ii).[3] The PSR also recommended granting Rodriguez a 3-level reduction for acceptance of responsibility, yielding a total offense level of 21. Calculating Rodriguez's criminal history category as III, the PSR's recommended sentencing range was 46 to 57 months.

On June 24, 2004, as Rodriguez awaited sentencing, the Supreme Court issued its decision in *Blakely v. Washington*, 542 U.S. 296 (2004), concluding that the State of Washington's mandatory sentencing guidelines contravened the Sixth and Fourteenth Amendments. On July 9, 2004, relying on *Blakely*, Rodriguez filed a written objection to the PSR, contending, inter alia, that application of the 16-level enhancement for a crime of violence (provided for in § 2L1.2(b)(1) (A)(ii)), rather than the 8-level enhancement (provided for in § 2L1.2(b)(1)(C)) for an aggravated felony (which he

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[3] Section 2L1.2(b) of the Guidelines provides for various sentencing enhancements based upon a defendant's criminal history at the time of his removal. Section 2L1.2(b)(1)(A)(ii) provides for a 16-level increase if the defendant had a prior felony conviction for "a crime of violence," and § 2L1.2(b)(1)(C), an alternative provision, requires an 8-level increase if the defendant had previously been convicted of an aggravated felony. The Application Note to § 2L1.2(b), as relevant here, defines "crime of violence" to include "forcible sex offenses, statutory rape, sexual abuse of a minor, . . . or any offense . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 2L1.2, comment. (n.1(B)(iii)).

admitted in his guilty plea), would contravene his rights under the Sixth Amendment's Jury Clause.[4]

At his sentencing hearing, conducted on July 26, 2004, Rodriguez renewed his *Blakely* objection. Had the sentencing court applied the 8-level enhancement Rodriguez requested, instead of the 16-level enhancement proposed by the PSR, Rodriguez's total offense level would have been 13, yielding a sentencing range of 18 to 24 months. Adopting the PSR's crime-of-violence recommendation, the court found "the Guidelines factors to be properly assessed at a range of 46 to 57 months," and it sentenced Rodriguez under the then-mandatory Guidelines to forty-six months in custody. J.A. 39.[5] Rodriguez has timely noted this appeal and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

There are, as a general proposition, two types of *Booker* errors. First, a sentencing court commits Sixth Amendment error if it enhances a sentence beyond the maximum authorized by facts found by a jury beyond a reasonable doubt or admitted by the

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[4] The Jury Clause ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury." U.S. Const. amend. VI.

[5] Rodriguez was sentenced prior to our decision in *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (en banc), *vacated*, 125 S. Ct. 1051 (2005), and the sentencing court did not announce an alternative sentence, *see Hammoud*, 381 F.3d at 353 (recommending in wake of *Blakely* that sentencing courts announce alternative sentences pursuant to 18 U.S.C. § 3553(a), treating Guidelines as advisory).

defendant. *See Booker*, 125 S. Ct. at 756; *United States v. White*, 405 F.3d 208, 215 (4th Cir. 2005). Second, a court commits statutory error if it treats the Guidelines as mandatory, rather than as advisory ("statutory *Booker* error"). *See Booker*, 125 S. Ct. at 757; *White*, 405 F.3d at 215. In this case, the sentencing court committed statutory *Booker* error in treating the Guidelines as mandatory.

A.

We must begin our analysis of Rodriguez's claim of statutory *Booker* error by assessing the scope of our review, i.e., whether our review is for plain error or harmless error.[6] Where a defendant has raised an issue for the first time on appeal, our review is for plain error only. *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 731-32 (1993). A defendant seeking to overturn a ruling under the plain-error test bears the burden of showing (1) that an error occurred, (2) that it was

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[6] At oral argument, the Government conceded that Rodriguez is entitled to resentencing due to statutory *Booker* error. This concession does not end our inquiry, however, as we are not at liberty to vacate and remand for resentencing on the Government's concession of error alone. *See Orloff v. Willoughby*, 345 U.S. 83, 87 (1953) ("This Court, of course, is not bound to accept the Government's concession that the courts below erred on a question of law. [Those courts] accepted the Government's argument as then made and, if they were right, we should affirm."); 5 C.J.S. *Appeal and Error* § 748 ("[C]oncession of a point on appeal is by no means dispositive of a legal issue."); *see also Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999) (per curiam) ("Although the concession of a point on appeal by respondent is by no means dispositive of a legal issue, we take it as further indication of the correctness of our decision today . . . .").

plain, and (3) that the error affected his substantial rights. *Olano*, 507 U.S. at 732. In any event, the correction of a plain error lies within our discretion, which we "should not exercise . . . unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks and alteration omitted).

In *White*, we applied plain error analysis to an unpreserved claim of statutory *Booker* error, concluding that such an error was not within the class of errors for which prejudice is presumed, and also deciding that such an error was not a structural error which should be noticed regardless of its effect. *See* 405 F.3d at 221-22. Accordingly, in order to obtain relief for an unpreserved statutory *Booker* error, a defendant is obliged to satisfy the standard enunciated in *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), by showing that, "after pondering all that happened without stripping the erroneous action from the whole, the judgment was substantially swayed by the error." *White*, 405 F.3d at 223 (internal quotation marks and alterations omitted). Relying on the absence of any statement by the sentencing court "that it wished to sentence White below the guideline range but that the guidelines prevented it from doing so," there was "no nonspeculative basis" for finding prejudice, and we affirmed White's sentence. *Id.* at 223-24.

Rodriguez's sentencing proceedings similarly lack any indication that the court would have imposed a different sentence under an advisory Guidelines regime. If plain error analysis controlled our review, we would thus be constrained to

conclude that the sentencing court did not reversibly err in treating the Guidelines as mandatory (the Government's concession notwithstanding).

We conclude, however, that Rodriguez properly preserved his claim of statutory *Booker* error by raising a timely *Blakely* objection at sentencing. We are therefore obliged to review his preserved claim of statutory *Booker* error for harmless error. Our position on this issue is consistent with the unanimous view of the nine courts of appeals to have considered the question.[7] *See United States v. Geames*, 427 F.3d 1333, 1339 (10th Cir. 2005) (concluding that statutory *Booker* error was preserved by *Blakely* objection); *United States v. Oates*, 427 F.3d 1086, 1091 (8th Cir. 2005) (same); *United States v. Burke*, 425 F.3d 400, 416-17 (7th Cir. 2005) (same); *United States v. Mathenia*, 409 F.3d 1289, 1291 (11th Cir. 2005) (per curiam) (same); *United States v. Fagans*, 406 F.3d 138, 141 n.1 (2d Cir. 2005) (same); *United States v. Antonakopoulos*, 399 F.3d 68, 76 (1st Cir. 2005) (same); *see also United States v. Vialpando*, No. 04-50955, 2005 WL 2600130, at *1 (5th Cir. Oct. 13, 2005) (unpublished per curiam) (concluding that statutory *Booker* error was preserved by *Blakely* objection); *United States v. Thomas*, 138 Fed. Appx. 759, 762 (6th Cir. July 12, 2005) (unpublished) (same); *United States v. Mitchell*, 133 Fed. Appx.

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[7] As of now, the First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have addressed the issue of whether a *Blakely* objection is sufficient to preserve a claim of statutory *Booker* error. Each of them, as spelled out above, has concluded that a *Blakely* objection suffices to preserve such a claim.

449, 450 (9th Cir. June 7, 2005) (unpublished memorandum) (same).

Although a *Blakely* objection could, as the Second Circuit recently observed, "be viewed as limited to preserving only a Sixth Amendment objection," a defendant raising such an objection has "sufficiently alerted the [sentencing court] to his claim that it was unlawful to use the Guidelines in a compulsory manner." *See Fagans*, 406 F.3d at 141 n.1. As the *Fagans* court further explained, "we now know that the compulsory use of the Guidelines . . . constitutes error, whether the error is considered punishment without due process of valid law or statutory error." *See id.* By interposing a *Blakely* objection, Rodriguez plainly notified the court of his position that he was being sentenced illegally, and he identified the line of Supreme Court precedent upon which he now relies. Accordingly, his claim of statutory *Booker* error is properly preserved, and we review it for harmless error.

B.

Pursuant to Rule 52(a) of the Federal Rules of Criminal Procedure, "[a]ny error . . . that does not affect substantial rights must be disregarded." In reviewing for harmless error, a defendant is thus entitled to relief if an error has affected his substantial rights. The prejudice inquiry under harmless error review differs from the inquiry under plain error review in that, under harmless error, the burden is on the *Government* to show that such an error did *not* affect the defendant's substantial rights. *See Olano*, 507 U.S. at 734.

Applying harmless error review in this appeal, Rodriguez is clearly entitled to be resentenced. The sentencing court erred in treating the Guidelines as mandatory, *see White*, 405 F.3d at 217, and such error prejudiced Rodriguez. As in *White*, the court offered no indication of whether it might have imposed a different sentence had it considered the § 3553(a) factors under an advisory Guidelines regime. This case differs from *White*, however, in that Rodriguez raised and preserved his legal point in a timely manner. The prejudice burden therefore falls on the Government, and the sentencing court's silence must be interpreted in favor of Rodriguez. Accordingly, we must conclude that Rodriguez was prejudiced when the court treated the Guidelines as mandatory. We are thus obliged to vacate Rodriguez's sentence and remand for further proceedings.[8]

III.

Pursuant to the foregoing, we vacate Rodriguez's sentence and remand for such other and further proceedings as may be appropriate.

VACATED AND REMANDED

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[8] Because we vacate Rodriguez's sentence for statutory *Booker* error, we need not decide whether, as Rodriguez also contends, the sentencing court committed Sixth Amendment error in concluding that he had been convicted of a crime of violence. The Government, however, represented at oral argument that it could readily establish on remand, by virtue of Rodriguez's Virginia indictment, that his convictions in Prince William County were for crimes of violence within § 2L1.2(b)(1)(A)(ii) of the Guidelines.